NO. 83-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C & H TRANSPORTATION CO., INC.,
Petitioner

vs.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR DAMAGES BY PAR INDUSTRIES, INC.

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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TO THE COURT:

This reply is filed on behalf of Par Industries, Inc. (Par), to the Petition for Writ of Certiorari of C & H Transportation Co., Inc. (C&H). The other respondent to this action is Jensen & Reynolds Construction Company (Jensen).

STATEMENT OF THE CASE

Par does not dispute the general facts. There is some disagreement between C&H and Jensen with regard to certain specific actions between them. For purposes of this reply, Par will accept the factual rendition of C&H, although Par does not acknowledge they are completely correct.

Par agrees with C&H's recitation of Par's actions, but disagrees with C&H's conclusions. Specifically, Par did load the equipment at its facility; however, Par was not the consignor.

ARGUMENT

This case presents the amazing spector of C&H continuing to allege that the Federal District Court for the Northern District of Texas has jurisdiction over Par, when the evidence shows Par (1) had *no* contacts with the forum state and, (2) had no contract with C&H. Rather than accept the holdings of the District Court and Court of Appeals, C&H presses its appeal to this Court, even though it has never cited one single statute, case, or authority in support of its position. Par submits this Petition for Writ of Certiorari is completely frivolous, with respect to Par, and requests this Court award Par damages for the expense and costs it has incurred in defending itself.

"The burden is on the Plaintiff to establish jurisdiction when challenged by the Defendant." *Familia De Boom v. Arosa Mercantile, S.A.*, 629 F.2d 1134, 1138 (5th Cir. 1980), citing *Product Promotions v. Cousteau*, 495 F.2d 483 (5th Cir. 1974). C&H ignored this burden with respect to establishing personal jurisdiction. It produced no evidence to support its pleading.

NO CONTACTS

Even as this Court has moved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714 (1877), to the more flexible approach of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945); it has never failed to require a demonstration that the non-resident defendant have "minimum contacts" with the forum state. *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099 (1982). Likewise, this Court has never hestitated to find a lack of personal jurisdiction when these "minimum contacts" are so slight that they offend a basic sense of fairness and reasonableness. *Kulko v. Superior Court of California*, 436 U.S. 84, 89 S. Ct. 1690, reh. den. 438 U.S. 908, 98 S. Ct. 3127 (1978). This general framework has been applied to a variety of factual situations. However, in virtually every instance, there has been some arguable basis for finding "minimum contacts".

This case presents a factual situation where C&H has failed to demonstrate any contacts with the forum state, at any time, by Par. In that respect, Par has a more valid claim than the defendant in *Worldwide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980). C&H failed to demonstrate even a "fortuitous circumstance" which would bring Par in contact with the forum state.

Both the District Court and Court of Appeals found C&H failed to establish Par had any contact with the forum state. C&H has never responded to these findings, but merely tries to assert that if the District Court has personal jurisdiction over Jensen, it should have personal jurisdiction over Par. No authority has ever been cited for this contention. In fact, stating the proposition refutes its validity. It was incumbent upon C&H to establish that the

Court had personal jurisdiction over Par, independent of its jurisdiction over Jensen. C&H failed to meet its burden and the granting of Par's Motion to Dismiss was proper and the ruling should be affirmed by this Court.

NO CONTRACT

Actually, C&H failed to meet its burden to establish personal jurisdiction at the stage prior to the consideration of "minimum contacts". C&H predicated jurisdiction in the District Court for the Northern District of Texas on the basis of the Texas long-arm statute (Vernon's Ann. Civ. St. art 2031b). In so doing, it relied upon § 4, and specifically the language in that section that deems a non-resident doing business in the state by entering into a contract with a Texas resident. (See Appendix C-3 to Petition for Writ of Certiorari.) However, C&H never demonstrated that Par entered into a contract with C&H. The District Court specifically found C&H never entered in to a contract in Texas with Par Industries. (Appendix B-2 to Petition for Writ of Certiorari.) On appeal, C&H did not challenge this finding and the Court of Appeals specifically held "(T)here is no record evidence that Par entered into a contract with C&H". (Appendix A-8 to Petition for Writ of Certiorari.) Thus, the District Court was completely correct in dismissing Par from this lawsuit, since C&H failed to satisfy the fundamental requirement of the Texas long-arm statute.

The only "evidence" C&H adduced was the conclusory allegation that it believed Par was the consignor. (Tr. 56) However, this assertion is completely refuted by the undisputed facts.

Par submits whether it was actually the consignor is not properly before the Court at this time. However, the

Court of Appeals did state in its decision that Par was the consignor, even though it found there was no contract between C&H and Par. Therefore, Par would request this Court reserve that determination and clarify the decision of the Court of Appeals.

The Court has recently recognized the consignor is the one with whom the contract of transportation is made. *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S. Ct. 1815 (1982). Taking the evidence in the light most favorable to C&H, it is clear C&H did not believe Par was the consignor but knew Jensen was arranging and agreeing to pay for all of the transportation. Under C&H's version of the facts, Jensen contacted it to arrange the transportation. Jensen told C&H to pick the shipments up at the Par facility in New Iberia, Louisiana. Jensen told C&H to deliver the shipments to the Foss Alaska Lines facility in Seattle, Washington. Jensen told C&H to bill the freight charges to Manitou Equipment Corp. Lastly, C&H received partial payment of the charges from Jensen or some entity associated with Jensen. There is absolutely nothing in the record to indicate Par was a party to this transportation contract. This was the finding of both the District Court and Court of Appeals.

Par's own actions indicate it cannot be considered the consignor. When C&H came to its facilities to pick up these shipments for Jensen, Par insisted upon a receipt from C&H. Because Par wasn't a party to the transportation contract, it wouldn't be furnished with a copy of the bill of lading. C&H tries to chastise Par for not signing the non-recourse provision of the bill of lading as consignor. The answer to this should be obvious to C&H. Par could not sign the non-recourse provision because it was not the consignor. In order for an entity to relieve itself from

liability under a bill of lading contract, it is first necessary that that entity be a party to the contract.

Since Par was not a party to any contract with C&H, it cannot be brought into this suit under the Texas long-arm statute. Therefore, the granting of Par's Motion to Dismiss was proper and the ruling should be affirmed by this Court.

REQUEST FOR DAMAGES

In prosecuting this Petition for Writ of Certiorari, C&H has again failed to realize the basis for dismissing Par from the suit for lack of personal jurisdiction was entirely different from the basis applied to Jensen. Rather than address this difference, C&H continues to try to combine the two dismissals under the same standard. To this extent, the appeal of the portion of the decision concerning Par must be deemed frivolous and vexatious.

U.S. Sup. Ct. Rule 50.4, 28 U.S.C.A., prevents Par from having the expenses of printing its reply taxed against C&H. However, U.S. Sup. Ct. Rule 49.2, 28 U.S.C.A., allows this Court to award Par damages where the Petition for Writ of Certiorari is frivolous. Pursuant to this latter rule, Par requests this Court award it damages, expenses, and attorney's fees, in the amount of $2,500.00, which will help defray and offset the costs incurred by Par in defending a decision based on applicable legal principals which C&H has failed to comprehend.

CONCLUSION

Since the evidence indicates Par had no contact with the forum state and did not enter into any contract with C&H which would make it subject to the Texas long-arm statute, the District Court's decision granting Par's Motion to Dismiss for lack of personal jurisdiction must be affirmed. By failing to address the basis for the decision with respect to Par, C&H has filed a Petition for Writ of Certiorari which is completely frivolous and vexatious to Par; and, Par should be awarded damages against C&H.

Respectfully submitted,

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